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### **REMARKS**

Claims 24, 43 and 45-52 and 54-56 were pending and stood rejected. Applicants have amended claims 24, 43 and 45. In particular, claim 45 was amended to correct a typographical error, which caused claims 45-48 to depend on a canceled claim. Applicants respectfully submit that claim 24, 43 and 45-52 and 54-56 are allowable.

#### **Claim Rejection - 35 U.S.C. § 112**

Claims 45-48 were rejected under 35 U.S.C. § 112, ¶ 2 for being dependent on a canceled claim. In response, claim 45 was amended to be depended on pending claim 43.

#### **Claim Rejection - Double Patenting**

Claims 24, 43, 45-52 and 54-56 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 5,489,307 (the "'307 patent"). Further, claims 24, 43, 45-48 and 54-56 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 5,700,291 (the "'291 patent"). Although applicants do not concede that the non-canceled claims are unpatentable over the claims of the '242 patent but will obviate the rejection by submitting a terminal disclaimer when allowable subject matters are indicated for the claims.

#### **Claim Rejections - 35 U.S.C. §§ 102 and 103**

Claims 24, 43, 45-52 and 54-56 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Michelson* (U.S. Patent No. 5,484,437) in view of *Jacobson*. Applicants believe that the claims, as amended, are patentable over the cited references. Specifically, claim 24, as amended, recites the step of "distracting said disc space by urging said distraction spacer from said cannula *completely recessed into said disc space* at said first location". (Emphasis added.) This feature is not disclosed by *Michelson* or *Jacobson* or any combination thereof. As explained in paragraph 165 of the specification, placing the distraction plug recessed allows the cauda to be moved over into the region of the distractor plug without the distractor plug damaging the cauda equina. Claim 24 is therefore not obvious in light of the cited references. Claims 49-56, being ultimately dependent on claim

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24 and thus contain additional features and advantages over the prior art, are therefore also not obvious over the cited references.

Claim 43, as amended, includes the feature of selecting a boring tool having a guide pin. This element is not disclosed or suggested by either *Michelson* or *Jacobson* or any combination thereof. Claim 43 is therefore not obvious in light of the cited references.

Claims 45-48, being ultimately dependent on claim 43, have additional features and advantages over prior art and therefore are also not obvious.

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Applicant respectfully requests that a timely Notice of Allowance be issued in this case.

Respectfully Submitted,

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Dated: April 25, 2005

M2:20709562.01